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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

NOS. ~~1309 and 1311~~ 132 + 133

LEMOIN CREE AND MARIE CREE, HIS WIFE, FREE-THOUGHT SOCIETY OF AMERICA, MADALYN E. MURRAY, TRUSTEE, AND LEDDIE MAYS, *Petitioners*,

v.

LOUIS L. GOLDSTEIN, COMPTROLLER OF THE TREASURY OF MARYLAND; ALBERT W. WARD, DIRECTOR, STATE DEPARTMENT OF ASSESSMENTS AND TAXATION; ROBERT L. MAINEN, SUPERVISOR OF ASSESSMENTS OF BALTIMORE CITY; JOHN G. ARTHUR, DIRECTOR OF ASSESSMENTS FOR BALTIMORE CITY; THE MOST REVEREND LAWRENCE J. SHEHAN, ROMAN CATHOLIC ARCHBISHOP OF BALTIMORE, A CORPORATION SOLE; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF MARYLAND; UNITED CHRISTIAN CITIZENS, INCORPORATED; TEMPLE EMANUEL OF BALTIMORE AND MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

## BRIEF OF RESPONDENT MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA, IN OPPOSITION

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## BRIEF OF RESPONDENT MARYLAND SYNOD OF THE LUTHERAN CHURCH IN AMERICA, IN OPPOSITION

Respondent, Maryland Synod of the Lutheran Church in America, opposes the granting of a Writ of Certiorari to review the Judgment of the Court of Appeals of the State of Maryland in the instant case, dated and entered

February 14, 1966, affirming the Decree of the Circuit Court No. 2 of Baltimore City, entered on December 14, 1964, dismissing the claim filed by the Petitioners herein, or Remand. In addition to the questions set forth by the Petitioners, the following question is presented in this cause:

Whether or not the constitutional issues attempted to be raised by the Petitioners present a justiciable case or controversy under the provisions of Section 2, of Article III, of the Constitution of the United States.

## STATEMENT OF THE CASE

This Court is respectfully referred to the opinion of the Honorable Wilson K. Barnes, Judge in Circuit Court No. 2 of Baltimore City, as appears in the Petition for a Writ of Certiorari filed by the Petitioners herein in Appendix II thereto, beginning on pages 22a-26a, which this intervening Defendant, Appellee, Maryland Synod of the Lutheran Church in America, adopts as its statement of the case and hereby incorporates by reference.

## STATEMENT OF FACTS

Maryland Synod of the Lutheran Church in America, adopts the Statement of Facts as set forth in the opinion of Judge Barnes in Appendix II to the Petition for a Writ of Certiorari, pages 26a-36a, and it incorporates said statement herein by reference.

## ARGUMENT

We firmly contend that this case does not present any question that this Court ought to review on a Writ of Certiorari. No federal question is involved herein in that the attack upon Article 81, section 9(4) of the Annotated Code of Maryland (Michie, 1957 Edition), involves no cognizable question under the Federal Constitution and does not present a case or controversy to be reviewed by this court under provisions of Section 2, of Article III, of the United States Constitution.

## I.

**WHETHER OR NOT THE TAXATION OF CHURCH PROPERTY WOULD BE IN VIOLATION OF THE DECLARATION OF RIGHTS AND OF THE FEDERAL CONSTITUTION IN THAT IT WOULD RESTRICT THE FREE EXERCISE OF RELIGIOUS EXERCISES AND RIGHTS.**

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." First Amendment to the Constitution.

If we apply the above amendment to the several States, under the provisions of the Fourteenth Amendment, can the State then tax church property?

"The power to tax involves the power to destroy," was well stated by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 431.

The moment the State undertakes to tax the Church, that moment the Church becomes subservient to the State. From that moment on, the Church is subject to the whims of politicians; the caprice of taxing authorities; in reality, the control of the State in general. Can it be said that this is not an interference with or a prohibition of the free exercise of religion? We emphatically say it cannot.

In *Knowlton v. Baumhover*, 182 Iowa 691, 704, 166 N.W. 202, 5 A.L.R. 41, it is well stated: "If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state."

The power to tax the church invades this absolute separation of church and state. It must necessarily follow that if the State has the power to tax the church, such taxation can then become regulation.

In *Murdock v. Pennsylvania*, 309 U.S. 105, 63 S. Ct. 891, 87 L. Ed. 1292, it was held that the power to impose upon a Jehovah's Witness any tax while promoting his religious teachings and selling religious books and pamphlets was a

tax upon his religion. If this be true, then, a fortiori, a tax upon the building which is used for the worship of God and within the confines of which the word of God is preached and the sacraments are administered is unconstitutional. Separation means separation and nothing else.

Several situations are worthy of consideration, to-wit:

1. To appraise a piece of property, at its perfect market value, is an impossibility. To tax the property of a Church would require the appraisal of that property at its true value. Here, at once, will arise conflict between Church and State in a difference of opinion as to values. It could result in the State giving preference to one sect or body as against another sect or body, or, even to one Church of a denomination, as against another Church of the same denomination. This surely is a prohibition of the free exercise of religion and is avoided by the exemption provisions.

2. If Church property is taxed and, because of economic, or other circumstances, a particular Church should default in the payment of the tax, what happens? The State must step in and sell the property at public auction to the highest bidder for the nonpayment of the taxes. In all probability, title to the property would pass to a nonreligious source and, in turn the Church, or the Congregation thereof, would be ejected from their property. We respectfully submit that if this is not a prohibition of the free exercise of religion then nothing is.

3. The Petitioners imply that by exempting a Church from taxation, the State is contributing to its support. This implication is not sustained by the decisions of our Courts. On the other hand, what would be the situation if the Church were taxed. It would result in the Church contributing to the support of the State. In turn, as to the extent of the tax, activities of the Church would be hampered and hence would result in a prohibition of the free exercise of religion.

For over 165 years, houses of worship, parsonages, and appurtenant ground have been exempt from taxation and from legislative sanction and approval in Maryland. This exemption has been uniformly applied and administered and there has been no difficulty about the matter. Could we have enjoyed this peaceful relationship between Church and State, had the situations aforementioned, or any of them prevailed? Of course not.

We do not deny that the State has the power to tax property owned by a church and which is not used in the exercise of religious activities. This power, however, cannot be extended to apply to property which is used for purposes of religious worship.

We respectfully and firmly submit that no building or property used exclusively for religious worship is taxable under the aforesaid First Amendment of the Constitution.

However, if this Court should by any means find that such property is a proper subject of taxation, then, and in that event, the various legislatures and Congress have the power to exempt any class of property that it chooses from taxation, so long as such exemptions are uniform.

## II.

### NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED FOR REVIEW.

Exemptions of houses of worship and other property used for religious purposes have existed in every state of the Union and the District of Columbia from time immemorial. The leading case in Maryland on the subject of tax exemption is that of *Baltimore City v. Starr Church*, 106 Md. 281, in which at page 285 it is stated:

> "We are not to be understood as denying to the Legislature the power, when State policy and considerations beneficial to the public justify it, to exempt, within reasonable limits, some species of property from taxation. A long continued practice, nearly contemporaneous in its origin with the adoption of the Con-

stitution itself, and many adjudged and carefully considered cases decided by this Court, abundantly support that power. But a power to exempt for reasons and upon considerations which are sufficient to uphold the exemption, is not a power to nullify the Constitution of the State.

"It will not be denied at this late day that the Legislature has the power, within reasonable limits, to exempt certain species or classes of property from taxation, when the public interests so require. This is actually done in the case of houses used exclusively for public worship, and the grounds appurtenant thereto, in the case of graveyards and cemeteries, and in the case of hospitals, asylums, and benevolent institutions. (Code, 1904, Art. 81, Sec. 4.) The validity of provisions of this kind is too well established to be now questioned. But it will be perceived in these cases all the property of the class indicated is exempted. The Legislature does not exempt some houses of public worship and tax others. It does not exempt some graveyards and cemeteries, some hospitals, and then tax other properties of exactly the same kind. It does not arbitrarily say that this particular house of public worship shall be exempt, but that one shall be taxed. On the contrary, all property falling within any one of the classes mentioned in Section 4 is exempt. There is therefore no arbitrary discrimination between different properties of the same kind, but all are treated alike."

There is a long line of decisions in Maryland affirming the above case, and it is cited with approval by the Supreme Court in *Williams v. Baltimore*, 289 U.S. 36, 41, 77 L. ed. 1015, 1021.

Every other jurisdiction of the United States has decided tax exemption cases in harmony with the *Baltimore City v. Starr Church* case, and no such constitutional or statutory exemption has been stricken down.

The *Williams v. Baltimore* case, supra, is probably as near as this Court has ever come to addressing itself to this

constitutional problem. Even so late as the *Abington School District v. Schempp*, 374 U.S. 203, Mr. Justice Brennan in a concurring opinion specifically recognized that tax exemptions of religious organizations were proper.

As one reviews the aforegoing cases and many other cases decided by this Court, it is respectfully submitted that no federal question cognizable by this Court is presented in this Petition.

The Petitioners ground their attack upon the premise that such exemption amounts to a subsidy of religion.

It is respectfully submitted that a tax exemption is not a subsidy. Webster's New International Dictionary defines a subsidy as "a grant of funds or property from a Government, * * * to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public." *Klies v. Linnane*, 156 Pa. Reporter 2d 183, 195. Under the above definition, it is respectfully submitted that a tax exemption is not a subsidy.

It has long been held that the State may tax certain classes of property and may exempt other classes so long as there is a reasonable and proper foundation upon which it is based. *Williams v. Baltimore*, supra. The Maryland Legislature has seen fit to exempt many kinds and types of organizations from taxation, believing that it is in the public good, which are set out in Article 81, Section 9, of the Maryland Code.

One of the beneficiaries of tax exemptions under Section 9 of Article 81 of the Maryland Code is Fraternal Beneficiary Associations (Sec. 9(3)). Certainly it cannot be successfully argued that because of the exemption of such associations from taxation in Maryland, the State has established a fraternal system. It can be no more argued that the granting of such exemption to religious organizations establishes religion which would contravene the Federal Constitution.

President Madison, when he and the founders of our Republic were giving deep consideration to the question of separation of church and state, believed that to allow tax exemptions to houses of worship would lead to encroachment by ecclesiastical bodies into the very Government itself. Time has fully proved that the existence of such tax privileges, which today are in effect in every State of the Union and the District of Columbia, has not resulted in a lowering of the bars of the wall of separation between Church and State. We maintain, therefore, that the establishment clause of the Federal Constitution cannot require and does not require a proscription of such exemptions upon the ground that it is an aid to religion. These tax exemptions are rooted deeply in the economics of our society. One has only to consider, for a moment, the effect that their removal would have upon all of the citizens of America to realize that they are so firmly established that no reasonable person could strike them down.

In *Everson v. Board of Education*, 330 U.S. 1, the Court in referring to the wall of separation between Church and State, said: "That wall must be kept high and impregnable, we could not approve the slightest breach." The Court found that the aid to parochial schools, the subject of that case, did not breach the law.

Mr. Justice Frankfurter in *McCollum v. Board of Education*, 333 U.S. 203, 212, 213, said:

> "The mere formulation of irrelevant constitutional principles is the beginning of the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established Church.' But agreement, in the abstract, that the First Amend-

ment was designed to erect a 'wall of separation between Church and State,' does not preclude a clash of views as to what the wall separates. Involved is not only the Constitutional principle but the implications of Judicial review in its enforcement. Accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere phrase."

Another impressive statement in *McCollum v. Board of Education,* supra, is that of Mr. Justice Black, to wit: "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."

Complete freedom of religion can be achieved by the legislature doing exactly what it has done under Section 9(4) of Article 81 by exempting from taxation all property used exclusively for religious worship.

We respectfully submit that no Federal question cognizable by this Court is presented by the Petition for the Writ of Certiorari.

## III.

### NO JUSTICIABLE CASE OR CONTROVERSY IS PRESENTED

The Petitioners have failed to show in this case under the decision of this Court in *Frothingham v. Mellon,* 262 U.S. 447, that they have standing to have their cause reviewed by this Court as any amount that they may have been called upon to pay would be so small and so insignificant that the doctrine of *de minimis non curat lex* would apply and, therefore, they have no standing in the matter of their Petitions.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE F. FLENTJE, JR.,
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of the Lutheran Church, in
America, Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

## RESPONDENT'S BRIEF IN OPPOSITION
**(The Most Reverend Lawrence J. Shehan, Roman Catholic Archbishop of Baltimore, a corporation sole)**

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# INDEX

## Table of Contents


| | PAGE |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Constitutional Provisions and Statutes Involved | 2 |
| Questions Presented | 3 |
| Statement of the Case | 3 |
| Argument: | |
| I. Petitioners' claim of violation of the establishment clause does not present a substantial federal question | 4 |
| II. Petitioners lack standing to maintain this action | 6 |
| Conclusion | 7 |


## Table of Citations

*Cases*


| | |
|---|---|
| City and County of San Francisco v. McGovern, 152 Pac. 980 (Calif., 1915) | 5 |
| County of Santa Clara v. Southern Pac. R. Co., 18 F. 385 (9th Cir., 1883), affirmed 118 U.S. 394 (1886) | 6 |
| Doremus v. Board of Education, 342 U.S. 429 (1952) | 6, 7 |
| Elliott v. White, 23 F. 2d 997 (D.C. Cir., 1928) | 7 |
| Fellowship of Humanity v. County of Alameda, 315 P. 2d 394 (Calif., 1957) | 5 |
| Frothingham v. Mellon, 262 U.S. 447 (1923) | 7 |
| Garrett Biblical Institute v. Elmhurst State Bank, 163 N.E. 1 (Ill., 1928) | 5 |

PAGE

General Finance Corporation v. Archetto, 176 A. 2d 73 (R.I., 1961), appeal dismissed, 369 U.S. 423 (1961) ..... 5, 6

Heisey v. County of Alameda, 352 U.S. 921 (1956) ..... 6

Lundberg v. County of Alameda, 298 P. 2d 1 (Calif., 1956), appeal dismissed, 352 U.S. 921 (1956) ..... 5, 6

Sisters of Holy Cross v. Town of Brookline, 198 N.E. 2d 624 (Mass., 1964) ..... 5

Sovereign Camp, W. O. W. v. Casados, 21 F. Supp. 989 (N.M., 1938), affirmed, 305 U.S. 558 (1938) ..... 6

State v. Alabama Educational Foundation, 163 So. 527 (Ala., 1935) ..... 5

Swallow v. United States, 325 F. 2d 97 (10th Cir., 1963), cert. denied, 371 U.S. 950 (1963), rehearing denied, 372 U.S. 925 (1963) ..... 5, 6, 7

United States v. Department of Revenue of State of Ill., 202 F. Supp. 757 (N.D. Ill., 1962), affirmed, 371 U.S. 21 (1962) ..... 6

*Constitution and Statutes*

Constitution of the United States:

Article III, Section 2 ..... 2, 6

First Amendment ..... 3

Fourteenth Amendment ..... 3

United States Code:

Title 28, Section 1257(3) ..... 2

Annotated Code of Maryland:

Article 81—

Section 9 ..... 2, 4, 5

Section 9(4) ..... 2, 3, 4

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## RESPONDENT'S BRIEF IN OPPOSITION
**(The Most Reverend Lawrence J. Shehan, Roman Catholic Archbishop of Baltimore, a corporation sole)**

This brief is filed in opposition to the Petitions for Certiorari filed by *Lemoin Cree, et al.*, No. 1309, October Term, 1965, and by *Madalyn E. Murray, et al.*, No. 1311, October Term, 1965.

## OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 241 Md. 383 and 216 A. 2d 897. The opinion of the Circuit Court No. 2 of Baltimore City is not reported.

## JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on February 16, 1966 and a motion for reargument was denied without opinion on March 2, 1966. These Petitions were filed on May 13, 1966. The jurisdiction of this Court is sought under U.S.C., Title 28, Section 1257(3).

Jurisdiction is challenged by this Respondent.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the provisions and statutes set forth by the Petitioners, the following are involved.

1. Article III, Section 2 of the Constitution of the United States:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . ."

2. Article 81, Section 9, Annotated Code of Maryland (1957 Edition, 1965 Replacement Volume). The specific exemption in subsection (4) here challenged must be considered in the context of the entire Section so that the Court can assay Maryland tax exemption policy. Section 9 is set forth in full in Appendix III to the Petition of Madalyn E. Murray, Trustee, and Leddie Mays (No. 1311, October Term, 1965).

## QUESTIONS PRESENTED

1. Does the statutory exemption violate the Fourteenth Amendment to the Constitution of the United States, to the extent that it applies to the states the prohibition of the establishment clause of the First Amendment?

2. Do the Petitioners have standing to raise this constitutional issue in this Court?

## STATEMENT OF THE CASE

This suit challenges a portion of Maryland's property tax exemption statute. The portion attacked exempts from taxation houses of public worship. It was brought by the Petitioners, Murray and Mays, in Circuit Court No. 2 of Baltimore City against appropriate Baltimore City and Maryland officials. Petitioners, Cree and Freethought Society of America, intervened as plaintiffs, and the Respondents, the Roman Catholic Archbishop of Baltimore, the Convention of the Protestant Episcopal Church in the Diocese of Maryland, the United Christian Citizens, Incorporated, Temple Emanuel of Baltimore, and the Maryland Synod of the Lutheran Church in America, intervened as Defendants.

The complaint, which was brought in Petitioners' capacity as taxpayers, alleged that subsection (4) of Section 9 of Article 81 of the Maryland Code is invalid, as violative of the Federal Constitution, because: (1) it is a law respecting an establishment of religion and prohibiting the free exercise thereof, and (2) it deprives the Petitioners and others similarly situated of property without due process of law. The Respondents answered the complaint denying the Petitioners' claims of unconstitutionality and challenging their standing to sue.